Petition

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No. 81-1710

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

OHIO VALLEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL NO. 1787,

Petitioner,

v.

PEASE COMPANY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does an employer's preconceived determination, upon entering into negotiations for a renewal contract with an established union, not to negotiate a contract except on its own terms, support an NLRB finding of a lack of good faith on its part, or can such a finding be made only from conduct clearly showing an intent not to enter into a contract of any nature?

LIST OF PARTIES

In addition to the parties listed in the caption, the National Labor Relations Board was a party to this proceeding in the Court of Appeals.

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No. .....

OHIO VALLEY CARPENTERS DISTRICT COUNCIL,
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,
AFL-CIO, LOCAL NO. 1787,

Petitioner,

v.

PEASE COMPANY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 1787 respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Pease Company* entered on December 16, 1981.

OPINIONS BELOW

The December 16, 1981 opinion of the Court of Appeals is reported at 666 F.2d 1044 (6th Cir. 1981) and is set out in the Appendix hereto, pp. 1a-16a. The decision of the National Labor Relations Board of August 25, 1978 is reported at 37 N.L.R.B. 1069 and 99 LRRM 1166, and is set out in the Appendix hereto, pp. 16a-47a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The pertinent parts of Section 8 (a) (5), 8 (d), 10 (c) and 10 (e) of the Labor Management Relations Act, 29 U.S.C. §§ 158 (a) (5) (d), 160 (c) and (e) are reported in the Appendix hereto.

STATEMENT OF THE CASE

On February 24, 1977, Ohio Valley Carpenters District Council, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Local No. 1787 ("Petitioner" or "The Union"), filed a charge alleging violation of §§ 8 (a) (1) and (5) of the Labor Management Relations Act, 29 U.S.C. §§ 158 (a) (1) and (5) ("the Act") by the Pease Company ("Petitioner" or "the Company"). A complaint alleging violations of §§ 8 (a) (1) and (5) was issued, and a hearing was held in May and June, 1978 (App. 24a).

The Administrative Law Judge and a unanimous panel of the National Labor Relations Board ("the Board") held

that the Company entered negotiations with a closed mind, determined not to negotiate terms acceptable to the Union; that it intentionally dragged out the negotiations, misled the Union as to its positions, raised spurious issues, created obstacles to agreement, utilized procedures designed to protract bargaining and obfuscate the issues, and adamantly refused to make any meaningful concessions on any substantial issue; that it failed and refused to bargain in good faith, in violation of §§ 8 (a) (1) and (5) of the Act; and that it deliberately forced an unfair labor practice strike. (App. 42a) The Board found that the Company had committed independent violations of § 8 (a) (1), in addition to the unfair labor practices found by the Administrative Law Judge (App. 21a).

The Administrative Law Judge found that the Company's conduct demonstrated an intent to rid itself of the Union, and accordingly recommended a broad remedial order requiring, *inter alia,* that the Company cease and desist from any infringement of its employees § 7 rights. Tho Board adopted his conclusion and recommended order, stating that a review of the entire course of dealings of the parties revealed that Respondent engaged in a pattern of conduct evidencing a preconceived determination not to reach agreement except on its own terms, irrespective of the Union's bargaining powers, approach, or techniques (App. 19a).

The Company petitioned the Court of Appeals for the Sixth Circuit to have the Board's order set aside, and the Board cross-petitioned for enforcement. The Union intervened, seeking enforcement.

The Court of Appeals for the Sixth Circuit issued a decision on December 16, 1981 granting the Company's petition and denying enforcement of the Board order. The

Court first held that the evidence did not support a finding of independent violations of § 8 (a) (1). The Union does not seek review of this holding (App. 8a).

The Court then held that there was not sufficient evidence on the record as a whole to support the Board's finding that the Company failed to bargain in good faith in violation of § 8 (a) (5) of the National Labor Relations Act. The Court found that the Board erred in its finding that the Company failed to bargain in good faith by determining that it would not negotiate a contract except on its own terms, which it knew would be unacceptable to the Union. The Court found that the Company had been engaged in permissible "hard bargaining" which did not violate the Act. Accordingly, if found that the Union's strike was not an unfair labor practice strike, and denied enforcement of the Board's order requiring reinstatement of the strikers (App. 15a-16a).

STATEMENT OF FACTS

The Company is an Ohio corporation which is engaged in the manufacture and sale of building products in Hamilton and Fairfield, Ohio. The Union has represented employees of the Company since 1945 and has been a party to about 18 collective bargaining agreements with the Company (App. 25a).

The parties had a contract which was effective from March 1, 1974 through February 28, 1977. During that period, the Company had recovered from an economic slump and was expanding its facilities. The new facilities were all non-Union (App. 26a).

In 1976, with the aid of a consultant, the Company made

preparations for 1977 contract negotiations, Its objectives included contract changes which would substitute plant seniority for the existing Company seniority system; a drastic reduction in the time a laid-off employee retained status; equalization of overtime; a change of the wage structure (App. 28a); an increase in the probationary period (App. 4a); elimination of existing Union offices; elimination of excused time off for Union meetings; and a reduction in superseniority (App. 51a-53a).

Eighteen bargaining sessions were held between December 15 and May 13. At the first session, the Union made some substantive proposals, and the Company made none (App. 3a).

At the second meeting, on January 5, the Union made the rest of its proposals including one on subcontracting. The Company proposed to limit seniority to the plant rather than the unit; to reduce the period of layoff status without loss of seniority from eighteen months to six months; and to increase the probationary period for new employees from thirty to ninety days (App. 4a). At later meetings the Company proposed elimination of the clauses in the previous contract that provided for Union offices and for unpaid leave to attend Union meetings. It also proposed reductions in Union time and superseniority (App. 51-52a). The Company impliedly assured the Union that there would be no problem on wage rates (App. 36a). During the course of negotiations, its negotiator assured the Union that the Company was making money and doing well (App. 50a).

On February 18, 1977, ten days before the contract expired, the Company proposed a major revision in job classifications to combine long standing jobs (App. 4a).

On March 1, when the contract expired, the employees

went on strike (App. 5a). The Company then proposed that there be no change in wage rates, and that there be a cap rather than the existing contractual minimums for cost of living adjustments (App. 41a). After hiring strike replacements, the Company proposed that those employees hired after March 1 not be required to join the Union (App. 39a), although it had been a Union shop for many years. By mid-June the Company had hired about 220 replacements and all three unionized plants were operating with these replacements (App. 5a).

REASONS FOR GRANTING THE WRIT

The Decision Of The Court of Appeals For The Sixth Circuit Is In Conflict With The Decisions Of Other Courts Of Appeals.

The Sixth Circuit erroneously relied on its 1955 decision in *NLRB* v. *United Clay Mines*, 219 F.2d 120 (6th Cir. 1955) as a statement of the appropriate standard for finding bad faith. The Court cited that case for the proposition that bad faith may be found "only from 'conduct clearly showing an intent not to enter into a contract of any nature'". *Id.* at 125 (App. 10a).

This standard is in clear conflict with the standards set by this Court and other Courts of Appeals. This Court has approved the Board's position that good faith requires a serious intent to adjust differences and reach a common ground and has rejected the idea that either party may maintain a "take it or leave it" attitude. *NLRB* v. *Insurance Agents*, 361 U.S. 477, 485 (1960). Good faith is inconsistent with a predetermined resolve not to budge from a predetermined position. *NLRB* v. *Truitt Mfg.*

Co., 351 U.S. 149, 155 (Justice Frankfurter concurring and dissenting in part). These statements indicate that the Labor Board may look at the actions of the parties to determine whether they actually intended to reach a meaningful settlement. More than mere willingness to enter into "some contract" is required.

Indeed, more than a willingness to enter into some contract that might predictably be *acceptable* to the other party is required. In *General Electric* v. *NLRB*, 418 F.2d 736 (2nd Cir. 1969), *cert. denied*, 397 U.S. 965 (1970), the Second Circuit held that a fixed resolve not to budge from a predetermined position — even a beneficent one — was inconsistent with good faith.[1]

The Board's decision here was based on the finding of such a fixed resolve:

> Respondent entered into and continued contract negotiations with the Union with a closed mind, having determined that it would not negotiate a contract except on its own terms, which it knew would be unacceptable to the Union and would force the Union to strike (App. 17a).

The Court of Appeals quoted the entire sentence (App. 9a), but then proceeded to criticize it as if the first part of the sentence did not exist:

> The Company correctly notes that the "acceptability" of its proposals to the Union is the touchstone from which all the Board's findings of bad faith emanate. This approach has led the Board astray, because good faith bargaining does not require the Company to make proposals that are acceptable to the Union (App. 9a).

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[1] This is, of course, not a "Boulwarism" case. It involved conduct rather worse than Boulwarism, since the Company's proposals were uniformly adverse to the Union rather than beneficial in any respect.

Had the Board's holding been that the Company had a "fixed determination to enter into a particular contract which it thought should be acceptable to the Union" the significance of fixed resolve would not have been lost. As the Court analyzed the case, however, the significance was lost as the matter was reduced to an analysis of "acceptability". Even this narrow analysis was inadequate, for failure to consider the record as a whole.

The Company proposed plantwide seniority instead of seniority throughout the bargaining unit; reduction of layoff status without loss of seniority; and equalization of overtime. The Administrative Law Judge found that the net effect of these proposals would be to eliminate seniority as a factor in the Company's operations and thus "to substantially eliminate the Union as a meaningful factor in the Company's day-to-day operation".

In addition to Company adhered to several other proposals that "struck at the lifeblood of the Union". It proposed increase of the probationary period from 30 to 90 days; elimination of time off without pay to attend Union meetings; elimination of Union offices; reduction of time allowed for Union business, and a reduction of superseniority protection for Union officials. The Company later proposed not applying the Union security clause for employees hired after March 1. At least some of these provisions were found to be "patently frivolous" and "made solely" for the purpose of undermining the Union's strength in the bargaining unit (App. 38a, 39a).

The Court compared some of the Company's proposals with substantive proposals that had been considered indicative of bad faith in other cases, and held that the proposals here were not as harsh and unreasonable (App. 13a n. 4). It made the comparison in a vacuum, giving no weight to bargaining history, current practice or financial circumstances.

It has been well settled by the Courts of Appeals that such surrounding circumstances should be given weight. *NLRB* v. *Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978); *Queen Mary Restaurants* v. *NLRB*, 560 F.2d 403 (9th Cir. 1977). In all of the cases cited by the Court as involving harsh proposals the plant was newly organized and the Union had never had a contract. Here, the Company was a profitable organization which had been organized and had Union contracts for 30 years. The Company's proposals for across-the-board adverse changes in existing terms of employment were, in context, at least as unreasonable and harsh as the proposals found by other courts and conceded by the Court here to have been indicative of bad faith.[2]

The Court, quoting its 1979 antitrust decision in *McCourt* v. *California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) says, "Nothing in the labor law requires either party . . .to yield on its initial bargaining position; good faith bargaining is all that is required". The circularity of this observation can be broken only by an examination of surrounding circumstances to determine the reasonableness of proposals, which the Court eschewed.

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[2] The facts of cases which the Court relies upon to support its finding of hard bargaining also do not correspond with its disregard of the Board's expertise in this case. In *NLRB* v. *Tomco Communications*, 567 F.2d 871, 97 LRRM 2660 (9th Cir. 1978) a major factor in the Court's decision was that the Board reversed the Administrative Law Judge's careful decision that the employer had bargained in good faith during most of the negotiations. *Id.* at 877, 97 LRRM at 2663. In *Gulf States Manufacturing, Inc.*, 579 F.2d 1298, 99 LRRM 2547 (5th Cir. 1978, 590 F.2d 896 (5th Cir. 1979) (en banc), the employer had made bona fide concessions in many of the proposals which it made in response to the 40 demands of the Union. In both these cases, the Union was newly certified and the Employer was bargaining for the first time.

The other Courts of Appeals have split with the Sixth Circuit both on the weight to be given proposals and concessions and the deference to be given to the Board's inferences about an employer's state of mind.

The First Circuit recently upheld the Board's 8 (a) (5) finding where in ten out of thirteen proposals, the Company sought an agreement less favorable than current practice and the company made only minor concessions. The Court stated that:

> The failure to make meaningful concessions on nearly every subject suggests that something is awry. . . . if management has adhered uniformly to proposals predictably unacceptable to the Union, has refused to make meaningful concessions in nearly ever area and his insisted (without clear justification in principle) on maintaining its original positions in these areas, one has some evidence for concluding that the Union has engaged in surface bargaining.

NLRB v. *Cablevision,* 660 F.2d 1, 5, (1st Cir. 1981).

In *Mar-len Cabinets, Inc.,* 659 F.2d 995, (9th Cir. 1981) the Ninth Circuit also disagrees with the Sixth Circuit's view concerning acceptability of proposals:

> Proposal content supports an inference of intent to frustrate agreement where, as here, the entire spectrum of proposals put forward by a party is so inconsistently and predictably unpalatable to the other party that the proposer should know agreement is impossible.

Id. at 999.

Also in *NLRB* v. *Wright Motors, Inc.,* 603 F.2d 604, 609, 102 LRRM 2021, 2025 (7th Cir. 1979), the Seventh Circuit found that the employer's insistence on unreasonable positions to avoid negotiating on economic issues was evidence of bad faith and noted that "sometimes, especially

if the parties are sophisticated, the only indicia of bad faith may be proposals advanced and adhered to".

In refusal to bargain cases several courts have held that the reviewing Court may not substitute its judgment for that of the NLRB in cases where different inferences may be reasonably drawn from the same evidence, even if that court would have decided the case differently. *Clearwater Finishing Co.* v. *NLRB,* — F.2d —, 109 LRRM 2521, 2523 (4th Cir. 1982); *Queen Mary Restaurant* v. *NLRB,* 560 F.2d 403, 407 (9th Cir. 1977). Contrary to this standard, the Sixth Circuit drew its own inference of hard bargaining from the same evidence from which the Administrative Law Judge and the NLRB drew the inference of surface bargaining.

The proposals and bargaining positions were uncontested facts from which several experts reasonably concluded that the Company had steadfastly refused to bargain in good faith. The Supreme Court has stated that the Board has been afforded flexibility to determine whether a party's conduct at the bargaining table evidences a real desire to come into agreement and that such inferences may be drawn from the conduct of the parties as a whole. *NLRB* v. *Insurance Agents Union,* 361 U.S. 477, 498, (1960). The Sixth Circuit has ignored the Board's expertise and the substantial evidence it relied upon in deciding that the Company's intransigence on its proposals reflected bad faith.

CONCLUSION

The conflict among the various Courts of Appeals and the importance of these questions to the future of labor relations make it essential that this Court grant certiorari. Meaningful collective bargaining is the foundation of industrial peace and an essential element of labor relations.

While the Board must not prescribe the outcome of bargaining, it must be given the freedom to pierce through the facade of today's sophisticated surface bargaining techniques to determine that one party actually has no intention to bargain in good faith. Petitioner respectfully asks this Court to review the erroneous decision of the Court of Appeals and clarify the proper standards for review of Board decisions on surface bargaining.

Respectfully submitted,

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Appendix

APPENDIX A

No. 78-1395

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PEASE COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

OHIO VALLEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, LOCAL No. 1787, AFL-CIO,

Intervenor.

ON PETITION for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed December 16, 1981

Before: KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

JONES, Circuit Judge. The Pease Company (the Company) petitions this Court to review and set aside an order

of the National Labor Relations Board (the Board) directing the Company (1) to cease threatening employees that it would be futile to have a union represent them, (2) to cease its refusal to bargain collectively in good faith with the Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America (the Union), and (3) to offer strikers, whom the Board found to be unfair labor practices strikers, immediate reinstatement and back pay upon their unconditional application.[1] The Board has filed a cross-application for enforcement of its order. We find that the Board's order is not supported by substantial evidence in the record as a whole. We therefore grant the Company's petition and deny enforcement of the Board's order.

I.

The Company, an Ohio corporation, manufactures and sells prefabricated doors, houses and building products. The Union has represented the Company's production and maintenance employees since 1945. Until 1969 the Company operated with a single plant in Hamilton, Ohio. In that year a second plant was added in Fairfield, Ohio, and in 1974 a third plant was added in Hamilton, Ohio. The Union's representative status was extended to the new plants and employees in the three plants constitute a single bargaining unit.

The most recent contract between the Company and the Union was effective from March 1, 1974 through February 28, 1977. On November 1, 1976, the Union requested negotiations for a new contract and the parties agreed to begin negotiations on December 15. Since the Company

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[1] 237 N.L.R.B. 1069 (1978).

is alleged to have engaged in mere surface bargaining, it is necessary to give the highlights of the eighteen bargaining sessions from December 15 to March 13, when the case was heard by the Administrative Law Judge (ALJ).[2]

At the first meeting, the Company made no substantive proposals, but proposed a six-point format for the negotiations: 1) the parties should be free to make proposals at any time, 2) they could change proposals at any time; 3) they could not trade language for money; 4) they should straighten out contract language first; 5) they should keep negotiations moving, without the necessity of a last-minute rush; and 6) they should regard all agreements as tenative until total agreement was reached. The Union went through approximately half of the 1974 contract and indicated proposed changes.

The day before the second meeting, on January 14, Operations Manager William Schnitzler attended a grievance meeting with the Union President, Jesse McVey, and the Union's Chief Negotiator, Edwin Swope. According to testimony by McVey and Swope before the ALJ, Schnitzler remarked at the close of the meeting that he would not have to hear any more grievances in eight weeks, when the present contract was due to expire. They also testified that in December Schnitzler had made a derogatory remark to a subcontractor about union help, followed by the comment that in a couple of months he would not have to worry about it. These remarks were interpreted as an

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[2] Reconstruction of the course of negotiations was made unduly difficult by the failure of the ALJ to provide a chronological account of the meetings. Though the ALJ stated that a "session-by-session, blow-by-blow recitation of the negotiations would have served no useful purpose, 237 N.L.R.B. at 1074, such a recitation would be the better practice where an allegation of surface bargaining has been made.

indication that the Company did not intend to reach agreement with the Union on a new contract.

At the second session, on January 5, the Union introduced a proposal to limit the Company's right to subcontract. The Company made three major proposals: to limit seniority to the plant rather than the unit; to reduce the period of layoff status without loss of seniority from eighteen months to six months; and to increase the probationary period for new employees from thirty to ninety days. The parties did not reach agreement on any of these proposals.

On January 19, a third meeting was held. The Union modified its position on subcontracting, proposing that an employee displaced by subcontracting receive severance pay or be given the right to transfer to another Company plant without loss of seniority or other contractual rights. The Company modified its stance on the plant seniority issue with an offer to retain unit seniority for employees hired before April 1, 1969. The Company also sought equalization of overtime. Again no agreement on these proposals was reached.

Further meetings were held on February 1, 8, 18, 23 and 24. Subcontracting continued to be a major source of disagreement. The Company presented revisions of its proposals to establish plant seniority, to reduce the period of employee status on layoff and to reduce the role of seniority in the assignment of overtime. On February 18, the Company proposed a job reclassification scheme, and separate meetings were held to discuss its application to each of the three plants. On February 27, the Company proposed to delete the shop rules from the contract. The Union did not agree to any of these Company proposals. A federal mediator joined the negotiations on February

24 and urged the parties to present their economic proposals notwithstanding the extensive disagreements over contract language.

On February 25, the Union held a meeting to inform its membership of the progress of the negotiations and to take a strike vote. The employees voted to strike, and actually went out on strike on March 1, after an unproductive session on February 28.

The Union and the Company continued to meet after the strike. The Union submitted a wage proposal which called for a 42 percent wage increase over the term of the contract. The Company's proposal provided no wage increases and place a cap on the cost of living adjustment clause contained in the previous contract. There was some movement on the probationary period issue. The Union suggested a forty-five day period, and the Company responded by lowering its suggested period from ninety to sixty days, but no agreement was reached. Similarly, on the issue of employee status during layoff, the Company proposed a one-year retention of employee status for senior employees and nine months for junior employees. The Union, however, would accept no reduction of the eighteen month retention period provided by the previous contract, having originally sought extension of the period to twenty-four months. On April 13, six weeks after the strike began, the Company tightened its previous positions. It withdrew its cost-of-living adjustment proposal, proposed that the Union security clause for employees hired after March 1 be eliminated, and proposed that supervisors be permitted to do unit work.

On April 29, the parties met, but agreed to meet again only if the mediator thought it necessary. By mid-June, the Company had hired about 220 replacements and all three unionized plants were in operation.

The Board, in agreement with ALJ, found that the Company had violated §§ 8 (a) (1) and (5) of the National Labor Relations Act (the Act) by failing to bargain in good faith with the Union. The Board, in disagreement with the ALJ, found that the statements alleged to have been made by Schnitzler also violated § 8 (a) (1) of the Act by threatening that union representation would be futile. The Board further found the strike an unfair labor practice strike from its inception.

II.

The Company contends that the Board's finding of a § 8 (a) (1) [3] violation based on the two remarks attributed to Operations Manager Schnitzler is unsupported by substantial evidence. We agree.

Jesse McVey, the Union Priesident, and Edwin Swope, the Union's Chief Negotiator for a new contract, testified that in December 1976 Schnitzler made a derogatory re-

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[3] Section 8(a)(1) provides that:

> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .

Section 7 provides that:

> Employees shall have the right to self-organization, of form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

mark about union help to an independent contractor working in the plant, followed by the comment that in a couple of months he would not have to worry about it. Schnitzler admitted making the derogatory remark but asserted that it was made in September and denied stating that soon he would not have to worry about union help. The ALJ credited Schnitzler's account. The Board nonetheless held that Schnitzler's derogatory remark, coupled with the statement that soon he would not need to worry about union help, which the ALJ found was not made, conveyed the message that the Company did not intend to engage in good faith bargaining and that bargaining, therefore, would be futile.

The Board is free to find facts and draw inferences different from those of the ALJ, but the reviewing court has an obligation to examine more carefully the evidence in cases where a conflict exists. *Larand Leisurelies, Inc.* v. *NLRB,* 523 F.2d 814 (6th Cir. 1975). Here McVey and Swope both testified that Schnitzler's statement was made after December 15. But as the ALJ noted, this testimony was clearly in error because the independent contractor to whom the statement was made did not work for the Company after December 3. The ALJ credited Schnitzler's testimony that the statement was made in September, was limited to a derogatory comment about union help, and made no reference to the upcoming negotiations. 237 N.L.R.B. at 1073 n.2. Yet the Board, without explanation, reversed the ALJ and credited the testimony of Swope and McVey that Schnitzler stated that he would not have to worry about the Union after a couple of months anyway. This determination is unsupported by substantial evidence, because the evidence conclusively establishes that Schnitzler's derogatory remark was made from three to six months before the expiration of the contract, at a time when a

further remark about not having to worry about union help in a couple of months would have been nonsensical.

Schnitzler's second statement was made on January 4, 1977. As he left a conference room at the end of a grievance meeting, Schnitzler remarked that in a couple more months he would not have to hear any grievances. Schnitzler testified that this statement only reflected his belief that someone other than he would listen to grievances under the new contract, because he was spending an increasing amount of time at the Company's new Denver facility. The ALJ, while finding that the statement implied that there would be no new union contract, did not find that Schnitzler implied a Company determination not to negotiate a contract in good faith. The Board, however, found a § 8 (a) (1) violation, holding that the statement implied that bargaining, and thus union representation, would be futile.

This statement does not support a § 8 (a) (1) violation. This was an isolated remark made to the Union President and its Chief Negotiator. The statement was ambiguous; an innocent interpretation is clearly consistent with the words used, while a threat is present only by a strained interpretation. Where, as here, there is no background of antiunion animus by an employer, trival and ambiguous conversations between a company official and an employee cannot form the basis of a § 8 (a) (1) violation. *St. Louis Car Division* v. *NLRB,* 439 F.2d 1145, 1148 (8th Cir. 1971); *Broadway Motors Ford, Inc.* v. *NLRB,* 395 F.2d 337, 340 (8th Cir. 1968). We therefore conclude that the Board's finding of a § 8 (a) (1) violation on the basis of this statement is unsupported by substantial evidence.

III.

The ALJ began his discussion of the eighteen bargaining sessions with the observation that:

> General Counsel does not contend, nor does the evidence show, that the Company ever refused to meet at reasonable times or with reasonable frequency, or that the Company ever failed or refused to discuss a proposal. During the first five or six sessions, which extended into February, the parties met from 1 p.m. to 3:30 p.m., when the first shift ended, at which time the Union representatives indicated that they wished to leave. As the contract expiration date approached, the parties met with increased frequency. All issues eventually were discussed between the parties, and the principal issues were discussed at length.

237 N.L.R.B. at 1074. Nonetheless, the ALJ and the Board concluded that the Company had failed to bargain in good faith, in that the Company had, in the Board's words:

> Determined that it would not negotiate a contract except on its own terms, which it knew would be unacceptable to the Union and would force the Union to strike.

237 N.L.R.B. at 1069.

The Company contends that the ALJ and the Board erred in not finding that the Company simply was engaged in lawful hard bargaining. We agree.

The Company correctly notes that the "acceptability" of its proposals to the Union is the touchstone from which all the Board's findings of bad faith emanate. This approach has led the Board astray, because good faith bargaining does not require that Company to make proposals that are acceptable to the Union. Rather, the Company's duty to bargain is defined by § 8(d) of the Act, which states that:

> To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and

> confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Thus the Company may insist on a proposal, however unacceptable to the Union, and if the insistence "is genuinely and sincerely held . . . it may be maintained forever though it produce a stalemate." *NLRB* v. *Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). A lack of good faith may not be found merely because a party attempts to secure provisions that the other party deems unacceptable, but rather may be found only from "conduct clearly showing an intent not to enter into a contract of any nature." *NLRB* v. *United Clay Mines*, 219 F.2d 120, 125 (6th Cir. 1955).

The Board also errs when it predicates a finding of bad faith bargaining on the view that the Company's proposals forced the Union to strike. First, there is no indication that the Company would not have allowed the bargaining unit employees to keep working after the contract expired while negotiations continued. The Union's decision not to seek an extension merely reflected a determination that its interest would best be served by exerting economic pressure on the Company. Moreover, the decision by the Union to strike provides no evidence that the Company bargained in bad faith:

> [T]here is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes.

American Ship Building v. *NLRB*, 380 U.S. 300, 313 (1965). Thus employees have no right to insist that company proposals be acceptable to them without the need to resort to a strike to attempt to gain desired concessions.

The proper standard, then, is not whether the Company made proposals which were acceptable to the Union, but rather, whether the Company desired "to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 485 (1960). Our examination of the specific indicia relied on by the ALJ and the Board leads us to conclude that neither the proposals nor the tactics of the Company, nor the sum of its conduct, amounts to substantial evidence of bad faith.

The ALJ found that the six-point format proposed by the Company was used "as a means of thwarting and frustrating agreement," that the Company acted in bad faith by disclosing its proposals "bit by bit over the course of negotiations," and that the time spent in negotiations prior to the strike "was grossly inadequate to enable the parties to arrive at a contract." 237 N.L.R.B. at 1074. We disagree. The ALJ conceded that the Union agreed to the proposed format, and no contention is made that the Union ever requested a departure from that format. The ALJ found the prohibition against trading contract language for better economic terms particularly offensive, but again, there is no indication that the Union desired to do so or would have been prevented from making such a proposal. As regards the alleged inadequacy of time, the record clearly establishes that the Company had disclosed what the ALJ termed its "principal objectives" by the fifth session on February 8. 237 N.L.R.B. at 1072. The Company's only other major proposal, the job reclassification scheme, was introduced on February 18. This permitted sufficient time for separate meetings at each plant and the

formulation of the Union's response, which was to reject the Company's proposals. Thus the fact that no agreement had been reached by March 1 cannot be attributed to unlawful tactics of the Company, but must instead be acknowledged as the result of each party exercising its right not to agree to the proposals of the other party.

The ALJ also faulted the Company for not making enough concessions on issues of substance and for not making those concessions the Company was prepared to offer at an earlier stage of the negotiations. The ALJ stated that:

> [A]lthough the Company submitted the plant-seniority proposal on January 6, it did not include a cutoff date until January 19, when it did so ostensibly to meet the Union's demand for protection of senior employees. This alleged concession was in any event more cosmetic than real, because employees with a seniority date prior to April 1, 1969, had such great seniority that they were virtually immune from economic layoff. Similarly, the Company made no real movement toward compromise on its proposal to reduce layoff status without loss of seniority from 18 months to 6 months. On March 14, 2 weeks after the strike began, the Company proposed a cutoff date of April 1, 1969, which would accord the senior employees layoff status for 1 year. In view of the Company's ostensible concern for senior employees and their virtually immunity from layoff, it is difficult to see why, if the Company were acting in good faith, it did not submit this cutoff date in its initial proposal, or soon thereafter. The Company made no movement in the direction of compromise on the real issue, i.e., layoff status of employees who faced a real possibility of layoff, until well after the strike began, when it verbally suggested the possibility of 9 months' layoff status for the junior employees with more than 18 months' seniority.

237 N.L.R.B. at 1074. This passage demonstrates the ex-

tent to which the ALJ wrongfully passed judgment on the timing and quality of the Company's concessions. As this Court has noted:

> Nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position; good faith bargaining is all that is required.

McCourt v. *California Sports, Inc.*, 600 F.2d 1193, 1200 (6th Cir. 1979). The ALJ's notions of good faith notwithstanding, a party is not required to lead with its best offer; it is free to bargain. *NLRB* v. *Katz*, 369 U.S. 736 (1962). Furthermore, there is nothing in the record to indicate that earlier concessions on these issues would have led to an agreement in light of the other substantial issues separating the parties.

Several substantive proposals made by the Company were deemed to be indicative of its bad faith. These included the reduction of employee layoff status, the switch from unit to plant seniority, a longer probation period for new employees, modification of the method for assigning overtime, and the continuance of the Company's existing right to subcontract production. While unusually harsh and unreasonable proposals may support a finding of bad faith bargaining, *NLRB* v. *Wright Motors, Inc.*, 603 F.2d 604 (7th Cir. 1979), the Company proposals challenged here do not meet this description.[4] The ALJ apparently

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[4] In *Wright*, the company's proposals supporting a finding of bad faith included (1) a guarantee of an "open shop," limiting the union's right to secure members and check off authorizations, (2) a management rights clause, not subject to the grievance procedure, which gave the company exclusive control over hours, work rules, and production, and allowed the company to shut down its business without regard to the effect on employees, (3) a no-strike, no-lockout clause which re-

believed that since the Company offered no concessions in the area of subcontracting it was obliged to offer better concessions in the other areas. 237 N.L.R.B. at 1076. But the law is well settled that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB* v. *American Insurance Co.*,

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quired the union to fine any employee who engaged in a prohibited work interruption, granted the company the right to seek an injunction and damages against the union without arbitrating the claim, made all union members liable individually and collectively for damages, and required the union to waive its legal right to remove a suit from state to federal court, (4) an article on arbitration providing only limited and permissive arbitration, and (5) a provision allowing the company to set hourly wage rates and to grant promotions at its sole discretion. 603 F.2d at 608 n.5

In *Continental Insurance Co.* v. *NLRB*, 495 F.2d 44 (2d Cir. 1974), a finding of bad faith was predicated in part on (1) the company's refusal to recognize the union as the sole and exclusive bargaining representative unless the union agreed not to organize or represent other company employees, (2) the company's insistence that arbitrators of grievances be picked exclusively by the company and (3) wage, vacation and severance pay proposals substantially less generous than the benefits provided to employees before the union was certified. 495 F.2d at 49.

In *NLRB* v. *Johnson Manufacturing Co.*, 458 F.2d 453 (5th Cir. 1972), a finding of surface bargaining was based on the Company's insistence that the Company retain complete and exclusive control of wages and working conditions, with the Union required to relinquish its right to bargain prior to any change.

In *NLRB* v. *Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717 (9th Cir. 1972), the court found substantial evidence of bad faith where the Company, after months of bargaining leading to the Union's acceptance of its proposals, raised spurious objections to its own proposals, and then stated that it would only sign a contract of seven weeks duration.

The Company's proposals in the instant case, unlike the company proposals discussed above, are not harsh, vindictive or unreasonable.

343 U.S. 395, 404 (1952). *See also Gulf States Mfrs., Inc.* v. *NLRB,* 579 F.2d 1298, 1318 (5th Cir. 1978), *rev'd in part on other grounds,* 598 F.2d 896 (5th Cir. 1979) (en banc); *NLRB* v. *Tomco Communications, Inc.,* 567 F.2d 871, 877 (9th Cir. 1978).

The ALJ also found that the Company withdrew its prior cost-of-living proposal after the strike to ensure that no agreement was reached. We disagree. The offer was not withdrawn at a time when agreement was imminent; even if the offer had not been withdrawn, substantial disagreement would remain over both economic and non-economic issues. Moreover, the offer was not withdrawn until six weeks after the strike began. An employer has a right to withdraw proposals made before a strike to reflect the changed economic background. *Omaha Typographical Union, No. 190* v. *NLRB,* 545 F.2d 1138 (8th Cir. 1976); *NLRB* v. *Alva Allen Industries, Inc.,* 369 F.2d 310 (8th Cir. 1966).

Though we have reviewed *seriatim* various factors relied on by the Board for its determination that the Company has engaged in bad faith bargaining, we recognize that the ultimate finding of bad faith is based upon the totality of the circumstances. *NLRB* v. *Milgo Industrial,* 567 F.2d 540, 545 (2d Cir. 1977). We conclude, however, that this is simply a case of hard bargaining between two parties who used their respective economic power to their best advantage. We hold that there is not substantial evidence on the record as a whole to support the Board's finding that the Company failed to bargain in good faith in violation of § 8(a) (1) and (5) of the Act.

The Board also found that the strike was an unfair labor practice strike. Inasmuch as we have determined that no unfair Labor practice was committed by the Company, it

follows that the strike was and continued to be an economic strike from its inception.

Accordingly, the Company's petition to review the Board's order is granted, and the Board's cross-petition for enforcement is denied.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD DECISION

Pease Company and Ohio Valley Carpenters District Council, United Brotherhood of Carpenters & Joiners of America, Local 1787, AFL-CIO. Case 9-CA-11101

August 25, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On February 9, 1978, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed an answer to Respondent's exceptions and brief in support of the Decision of the Administrative Law Judge, and the Charging Party filed cross-exceptions and a supporting brief. Respondent filed an answer to the Charging Party's cross-exceptions, along with a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order,[3] as modified herein.

We agree with the Administrative Law Judge, for the reasons fully stated by him, that Respondent entered into and continued contract negotiations with the Union with a closed mind, having determined that it would not negotiate a contract except on its own terms, which it knew would be unacceptable to the Union and would force the Union to strike. It thereby failed to bargain in good faith with the Union in violation of Section 8 (a) (5) and (1) of the Act.

Respondent urges numerous exceptions to the Admin-

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[1] Respondent has requested oral argument. This request is hereby denied, as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] For the reasons set forth in his partial dissent in *Drug Package Company, Inc.*, 228 NLRB 108 (1977), Member Jenkins would in any event begin Respondent's backpay obligation from the date of each striker's unconditional offer to return to work.

istrative Law Judge's conclusion, affirmed by us, that it failed to bargain in good faith. Thus, Respondent claims, *inter alia,* that in reaching this conclusion the Administrative Law Judge ignored conduct amounting to bad faith on the part of the Union. In support of this contention, Respondent cites, among other things, the failure of the Union to submit proposals in writing, its failure to keep minutes of the bargaining sessions, its loss of written company proposals, the fact that the Union had not submitted a wage proposal to the Company when its strike vote was taken, and its failure to obtain qualified bargaining assistance from the International Union or from counsel, even though Respondent suggested that such be done. Juxtaposed against such asserted union misconduct is, Respondent claims, the Administrative Law Judge's suggestion that Respondent should have made concessions at the outset of negotiations and should not have taken advantage of a union entering negotiations under naive assumptions. Furthermore, according to Respondent, the Administrative Law Judge implied that Respondent's bad faith was evidenced by its failure to comply with certain procedural tenets, including, for example, its failure to present proposals in triple-spaced form.

It is not, of course, the prerogative or desire of this Board to impose upon the parties any bargaining format, either substantive or procedural. It is, however, incumbent upon us to review the bargaining interactions of the parties when one party asserts that the Act's requirement of good-faith bargaining has not been complied with. In ruling upon the merit of such an allegation, we base our finding of either good- or bad-faith bargaining upon the totality of circumstances reflecting the respondent's bargaining frame of mind. *Rhodes-Holland Chevrolet Co.,* 146 NLRB 1304 (1964). We have carefully reviewed the record herein, in

light of Respondent's exceptions, and do not find any of the factors relied on by Respondent in urging error, nor their combined effect, sufficient to alter our conclusion that Respondent failed to bargain in good faith with the Union. To the extent that Respondent suggests that the Administrative Law Judge's Decision, and hence our affirmance thereof, is based upon a paternalistic concern for the Union and constitutes an attempt to equalize a disparity in bargaining positions between the parties which the Administrative Law Judge perceived to exist, we reject such a contention.[4] On the contrary, we find a review of the entire course of dealings of the parties reveals that Respondent engaged in a pattern of conduct evidencing a preconceived determination not to reach agreement except on its own terms, irrespective of the Union's bargaining powers, approach, or techniques. We further find, as did the Administrative Law Judge, that Respondent orchestrated the series of events eventuating in the Union's strike.

In concluding that Respondent entered negotiations with no intention of reaching accord on a contract, the Administrative Law Judge relied in part upon statements of Wil-

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[4] We note, moreover, that the Union's alleged lack of negotiation experience, stressed by Respondent as a determinative factor relied on by the Administrative Law Judge, was in fact mentioned at only one point in his Decision and was obviously not crucial to the conclusion therein. On the other hand, the Administrative Law Judge iterated several factors in describing Respondent's total bargaining approach on which we find it unnecessary to rely in concluding that Respondent failed to bargain in good faith. Thus, we place no reliance on Respondent's failure to present bargaining proposals in the form of a single-spaced draft as indicative of any lack of good faith on its part; similarly, we do not find that Respondent's proposals regarding a union label clause, its reference to "qualified" employee for taking inventory, and its refusal to agree to a union proposal regarding reimbursement for safety glasses had no basis in reality and therefore evidence its bad faith.

liam Schnitzler, operations manager of Respondent's Ever-Strait Division, which includes employees in the bargaining unit concerned herein. Although finding certain statements of Schnitzler evidentiary of Respondent's bad-faith bargaining, and although such statements were alleged by the General Counsel to be independent violations of Section 8(a)(1) of the Act, the Administrative Law Judge nonetheless failed to find that Schnitzler's statements constituted independent violations of the Act. We find merit in the Charging Party's exceptions thereto and hold, as set forth below, that Respondent violated Section 8(a)(1) of the Act through certain statements of Schnitzler.[5]

The record shows, as found by the Administrative Law Judge, that at a grievance meeting on or about January 4, 1977, Schnitzler stated that in 8 more weeks he would not have to hear any more grievances. Schnitzler, who represented management in handling grievances under the contract at the fourth, or last, step prior to arbitration, made this statement in the presence of Union Chief Negotiator Swope and Union President McVey, both employees of Respondent, approximately 2½ weeks after the contract negotiations involved in this proceeding commenced and approximately 8 weeks before Respondent's then-current contract with the Union expired on February 28, 1977. McVey threatened to file an unfair labor practice charge over the remark, but Schnitzler neither explained nor clarified the statement further.

The Administrative Law Judge found, and we agree, that Schnitzler's comment was made in reference to the

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[5] Statements of two other supervisors, William Deaton and Elmer Haddix, were also urged by the General Counsel to be violative of Sec. 8(a)(1) of the Act. Both of these incidents involved alleged threats of plant closure but the Administrative Law Judge credited the supervisors' denial of having made the alleged threats.

ongoing negotiations. He further found that through such comment Schnitzler was indicating that the Company fully expected from the outset that the negotiations would be unsuccessful, that they would not result in a new agreement, and that the Union would be forced to strike. We find that Schnitzler's statement implied a determination by Respondent not to engage in good-faith bargaining and therefore conveyed to the employees that bargaining, and thus, union representation, would be futile. We further find that an earlier derogatory remark regarding the quality of union help made by Schnitzler, and testimony of Swope and McVey that Schnitzler stated then that he would not have to worry about the Union after a couple of months anyway, also conveyed the same message. Such statements thereby tended to interfere with, restrain, and coerce employees in the free exercise of their right to be represented by a union in violation of Section 8 (a) (1) of the Act. *Princeton Sportswear Corporation of Pennsylvania,* 220 NLRB 1345, 1347 (1975); *Donn Products, Inc. & American Metals Corporation,* 229 NLRB 116 (1977).

Amended Conclusions of Law

Insert the following as Conclusion of Law 5 and reletter the subsequent Conclusions of Law accordingly:

"5. By threatening employees that it would be futile to have a union represent them, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act."

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby

orders that the Respondent, Pease Company, Hamilton and Fairfield, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1 (a) and reletter the subsequent paragraphs accordingly:

"(a) Threatening employees it would be futile to have a union represent them."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing in which all parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice and to carry out is provisions.

> We will not threaten employees that it will be futile to have a union represent them.
>
> We will not fail or refuse to bargain collectively in good faith with Carpenters Local 1787 as the exclusive representative of all our employees in the following appropriate unit:
>
> > All factory production and maintenance employees employed by us at our 900 Forrest Avenue, Hamilton, Ohio, 2580 Bobmeyer Road,

Hamilton, Ohio, and 7100 Dixie Highway, Fairfield, Ohio locations, but excluding all office clerical employees, professional employees, guards, supervisors as defined in the act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Aft.

WE WILL, upon request, bargain collectively with Local 1787 as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signal agreement.

WE WILL, upon their unconditional application, offer strikers not heretofore reinstated immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make whole for any loss of earnings, plus interest, strikers who have made themselves available for employment on an unconditional basis but who were refused reinstatement.

PEASE COMPANY

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: This case was heard at Cincinnati, Ohio, on May 23, 24, 25, and 26 and June 14 and 15, 1977. The charge was filed on February 25, 1977, by Ohio Valley Carpenters District Council, United Brotherhood of Carpenters & Joiners of America, Local 1787, AFL-CIO (herein the Union). The com-

plaint, which issued on April 13, 1977, alleges that Pease Company (herein the Company or Respondent) violated Section 8 (a) (1) and (5) of the National Labor Relations Act, as amended. The gravamen of the complaint is that the Company allegedly failed to bargain in good faith with the Union over the terms of a new collective-bargaining contract, and thereby caused or prolonged a strike by company employees. The complaint further alleges that the Company violated Section 8 (a) (1) by statements of several of its supervisors, which statements are further alleged as evidentiary of the Company's refusal to bargain in good faith with the Union. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs.

Upon the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by General Counsel, the Union, and Respondent, I make the following:

Findings of Fact

I. THE BUSINESS OF RESPONDENT

The Company, an Ohio corporation, is engaged in the manufacture and sale of prefabricated houses, doors, and building products at various locations, including 900 Forrest Avenue, Hamilton, Ohio, 2580 Bobmeyer Road, Hamilton, Ohio, and 7100 Dixie Highway, Fairfield, Ohio (herein respectively Builder #1, Builder #2, and Ever-Strait), the three plants involved in the present case. In the course of its business, the Company annually purchases and receives goods and materials valued in excess of $50,000 which

are shipped directly to its Hamilton and Fairfield, Ohio locations from points located outside the State of Ohio. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2 (5) of the Act.

III. THE BARGAINING UNIT INVOLVED

It is undisputed, and I find, that at all times material, specifically, during the contract negotiations which are the subject of this case, the Union was the certified collective-bargaining representative of the Company's factory production and maintenance employees at Builder #1, Builder #2, and Ever-Strait, and that said employees constitute an appropriate unit for collective bargaining.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background: The Situation at the Commencement of Contract Negotiations on December 15, 1976*

Builder #1 is the Company's original plant, and for many years it was the Company's only plant. The Ever-Strait plant commenced operations in 1969 and Builder #2 in 1974. Since 1945, the Union has represented the employees at Builder #1, and that representative status was extended to Ever-Strait and Builder #2, all in a single bargaining unit. The Company and the Union were parties to a series of about 18 contracts. The most recent, executed on February 28, 1974, was effective from March 1, 1974, through February 28, 1977.

The Union, i.e., Local 1787, is the Pease Local of the Carpenters' Union; that is, its membership is comprised of the Company's employees, and its officers are all company employees. Pursuant to the terms of the expired contract, the Company to a considerable extent subsidized the Union's operations. The Union maintained its office and telephone on company premises, and the Company compensated union officers and stewards for time spent on union business. In the case of the Union's president, that meant most or all of his time at the plants. When the 1974 contract was negotiated, the Company had only one other facility outside of the bargaining unit. The Company was, as it had been for many years, substantially a unionized firm. Late in 1974, the Company went into an economic slump which resulted in substantial layoffs. However, as the contractual period approached its termination date, the Company had recovered and was in the process of a vigorous expansion program. The Company acquired a plant at Yorktown, Indiana, where it commenced operations in February 1977, and a plant in Denver, Colorado, where it commenced operations in March 1977, shortly after the present strike began. The Yorktown plant made products similar to those produced in Builder #2, and the Denver plant produced the prefabricated doors which were also produced at the Ever-Strait plant. By June 1977, the Company had a total of 10 plants, all of which, with the exception of the three in the bargaining unit, were nonunion. In sum, the Company had worked itself away from a situation in which it was dependent upon union labor to one in which the Company believed that it could successfully withstand and defeat a strike. As will be discussed herein, additional evidence indicates not only that the Company was pleased with this new state of affairs but that the new situation

decisively affected the Company's position at the bargaining table.

Over the years the Union had succeeded in obtaining favorable contract terms. The employees enjoyed wage rates which were substantially higher than those of the Company's competitors in the Cincinnati area, including one whose employees were also represented by the Carpenters' Union. The 1974-77 contract contained detailed provisions governing the assignment of work, including overtime, transfers and promotions, and layoff and recall, which were designed to benefit the employees substantially on the basis of seniority. Indeed, the Union deemed seniority to be the lifeblood of the contract. However, all was not sweetness and light, particularly during the 1974-1977 contract period. As the bargaining unit expanded from one to three plants, the Company became increasingly dissatisfied with the contract provisions which accorded unit-wide, as opposed to plant seniority, for employees who had worked for the Company for at least 18 months. The matter was raised in the 1974 contract negotiations. However, those negotiations were affected by an unforeseen and tragic event. After the negotiations were underway, the Company's chief negotiator, who was also operations manager at the Ever-Strait plant, was killed in a plane crash. Company President James Pease, who had conducted the previous negotiations, took over as chief negotiator. The event had a subdueing effect on the parties. The parties reached a contract, on the Union's terms at least as to seniority, i.e., continued unit-wide seniority. However, the 1974 layoffs aggravated or raised new concerns on both sides. In the Company's view, the layoffs, coupled with the seniority provisions, resulted in an excessive amount of transfers from one plant to another, and bumping from one job to another, all of which had a

disruptive effect on the Company's operations. From the Union's standpoint, many layoffs and much loss of work were caused by subcontracting of work, which fell within the Company's prerogatives under the contractual management rights clause. Relations between the parties were aggravated in 1976 by a wildcat strike over unresolved grievances.

Early in 1976, the Company retained the services of Carl Becker, a New York attorney who was a specialist in the field of labor relations. Becker set up and directed an intensive training program for the Company's supervisory personnel. In September 1976, about 3 months before negotiations actually began, Pease assigned Becker to be the Company's chief negotiator in the upcoming contract negotiations. Under Becker's direction, the Company actively solicited from its supervisors their many complaints about the existing contract and proposed contract changes. By December 1976, the Company had formulated its objectives. The principal objectives, in sum, were: plant seniority; no restriction on the Company's right to exercise "make or buy" decisions, i.e., to manufacture or instead to purchase any product; a drastic reduction in the length of time on which a laid-off employee could retain his employee status; equalization of overtime assignment; and an end to what the Company considered to be an excessively high wage structure. In sum, the Company formulated its concept of what should be in a new contract, which concept differed radically from that of the Union. The net effect of these goals, if achieved, would be for all practical purposes to eliminate seniority as a factor in the Company's operations and, in large part as a consequence, to substantially eliminate the Union as a meaningful factor in the Company's day-to-day operations. As will be discussed, the

Company never deviated from those goals during the course of negotiations.

On November 1, 1976,[1] the Union requested negotiations for a new contract, and the parties subsequently agreed to commence negotiations on December 15. In contrast to the Company's intensive, high-powered preparations, the Union entered the negotiations under the naive assumption that nothing had changed. For reasons which I have found unnecessary to consider, the Union did not obtain the assistance of its International or District Council or of any outside source. Although the bargaining unit comprised about 400 employees, and the negotiations involved complex and difficult issues, the Union's negotiating team consisted of six employees, only one of whom (not chief negotiator Swope), had experience in prior negotiations. As will be discussed, the Company took full advantage of this situation.

B. *The Alleged Independent Violations of Section 8(a)(1)*

William Schnitzler was operations manager at Ever-Strait. He was not on the Company's negotiating team. However, he participated in planning for negotiations, and stood high in the management hierarchy. (As indicated, a predecessor was the Company's chief negotiator). Schnitzler was responsible for handling grievances at the fourth step, i.e., the last step before arbitration, on behalf of Company President Pease. Although witnesses varied as to the exact words, it is undisputed that at a grievance meeting on or about January 4, Schnitzler unequivocally told Union Chief Negotiator Ed Swope and Union Presi-

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[1] All dates herein refer to the period from July 1, 1976, through June 30, 1977, unless otherwise indicated.

dent Jesse McVey (who succeeded Swope as chief negotiator on April 8), that in 8 more weeks he would not be hearing any more grievances. The parties differ as to the implications of Schnitzler's words. General Counsel contends that he unlawfully gave the impression that the Company did not intend to enter into a new contract with the Union. Schnitzler testified that he had recommended to management that grievances should stop at the plant manager level, that he thought the Union would agree to this proposal, and that this was the basis for his remark. However, although the Union sometimes encountered difficulty in arranging meetings with Schnitzler, he had no objective basis for believing that the Union would agree to a proposal which would eliminate grievance handling above the plant manager level. In late February, the Company submitted such a proposal to the Union, but no agreement was reached. Moreover, although McVey threatened to file an unfair labor practice charge over the remark, Schnitzler did not then explain or clarify his statement. I find that Schnitzler was referring to the course of negotiations, and inferred that there would be no contract after February 28. Beyond that, the implications of Schnitzler's statement cannot be fully gauged without considering the entire course of negotiations, most of which took place after January 4. It does not follow that Schnitzler, who was given to making cryptic remarks, implied that the Company did not intend to negotiate a contract. I find in light of the Company's course of conduct both at and away from the bargaining table, discussed throughout this Decision, that Schnitzler was indicating that the Company fully expected from the outset that the negotiations would be unsuccessful and that the Union would be forced to strike. Whether or not that statement reflected an unlawful pattern of conduct depends on the

legality of the Company's conduct at the bargaining table, discussed under the next heading.[2]

Larry Rhodis, a member of the Union's negotiating committee, testified that on February 24 his supervisor, William Deaton, told him that "if you guys don't accept the [Company's] proposals," Pease "might move their operations." Henry Smith, also a member of the Union's negotiating committee, testified that on February 15, Supervisor Elmer Haddix told him that if the Union did not agree to the Company's proposals, "you can kiss Bobmeyer Road goodbye." Deaton and Haddix each denied making the alleged statement. Deaton testified that he said he hoped a contract was reached because he did not want to go to Yorktown. Haddix testified that he told Smith that it would be easy for the Company to make sections at Yorktown. In fact, after the strike began, Deaton and other supervisors went to the Yorktown plant to train new employees while Builder #2 was temporarily shut down, and the supervisors were informed of this plan prior to the strike. I credit the supervisors, because if they had made the blunt threats attributed to them, Rhodis and Smith

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[2] Swope and McVey testified that sometime in December Schnitzler, after making a sarcastic remark about the quality of union help, said that he would not have to worry about it anyway after a couple of months. Schnitzler, in his testimony, admitted making the remark about union help, but testified that he could not recall saying that he would not have to worry about it, etc. The presence of an outside contractor named Morgan, who did not work for the Company after December 3, and Schnitzler's absence from Ohio during most of December, indicates that the conversation took place well before the start of negotiations. I credit Schnitzler's testimony that the conversation took place in early September, at a time when Schnitzler did not make any references to the negotiations. Assuming, *arguendo*, that Schnitzler made the statement attributed to him by Swope and McVey, my findings with respect to their conversation in January would also be applicable to that statement.

probably would have brought up such threats at the next bargaining session, instead of simply ignoring them. The supervisors were referring to the Company's plans to meet a strike. As the plans themselves were lawful, their statements were not unlawful. However, as with Schnitzler's earlier statement, they indicated that the Company anticipated that the negotiations would fail and was planning to defeat a strike.

C. *The Bargaining Sessions*

The Company and the Union met in 18 bargaining sessions during the period from December 15 (the date of the first session) up to May 13.[3] About half of the sessions took place before March 1. On that date, when the 1974-77 contract expired, most of the employees went on strike. As of the present hearing, the strike was continuing. The Company shut down Builder #2 for 1 or 2 weeks but otherwise continued operations and by mid-June had hired about 220 replacements. As of that time, both parties indicated a willingness to continue negotiations.

No useful purpose would be served by a session-by-session, blow-by-blow recitation of the negotiations. Nearly all of the material operative facts are undisputed. As I indicated at the close of the hearing, the crucial questions concern the inferences to be drawn from those facts. To

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[3] The present hearing opened on May 11, 1977, but did not proceed because of the continuation of another, ongoing case before me. I requested that in the interim before the hearing could resume, the parties should explore the possibilities of settlement. On May 13, the Company and the Union met in another negotiating session, and at the renewed hearing. General Counsel sought to introduce evidence concerning the May 13 session. I ruled that the May 13 session constituted an effort to settle the unfair labor practice case, in response to my request, and therefore rejected the proffered evidence.

find those inferences, it is necessary, in a sense, to step back from the morass of testimony and exhibits, and consider them in their entirety. From that mass of evidence, the crucial facts emerge in true perspective.

First, I have considered those matters which General Counsel failed to allege or prove and which are commonly considered as evidentiary of a failure to bargain in good faith. General Counsel does not contend, nor does the evidence show, that the Company ever refused to meet at reasonable times or with reasonable frequency, or that the Company ever failed or refused to discuss a proposal. During the first five or six sessions, which extended into February, the parties met from 1 p.m. to 3:30 p.m., when the first shift ended, at which time the Union representatives indicated that they wished to leave. As the contract expiration date approached, the parties met with increased frequency. All issues eventually were discussed between the parties, and the principal issues were discussed at length. The problem, as it eventually developed, was that the time which the parties spent in negotiations prior to March 1 was grossly inadequate to enable the parties to arrive at a contract by that date. As of December 15, the Company knew this, but the Union did not, and the Company by a variety of skillful and sophisticated tactics kept the Union in the dark until it was too late to avoid a strike.

At the first session on December 15, company Chief Negotiator Becker proposed a six-point format for the negotiations. Becker declared that: (1) the parties should be free to make proposals at any time; (2) they could change proposals at any time; (3) the parties could not trade language for money; (4) contract language should be straightened out first; (5) the parties should keep the negotiations moving, without the necessity of a last-minute

rush; and (6) all agreements would be tentative until total agreement was reached. The Union agreed to these ground rules, as it assumed that the Company was acting in good faith. Had the Company been acting in good faith, these rules need not have been an obstacle to negotiation of a contract. In fact, the Company had no intention of carrying out point 5, and it utilized the other ground rules as a means of thwarting and frustating agreement. Before the negotiations began, the Company had carefully formulated its conception of a contract, and that concept entailed substantial and material revisions in the contract language. By separating the questions of contract language from monetary matters, the Company at the very outset of negotiations foreclosed a major avenue by which compromises might have been reached. It is not true, as attorney Becker asserted in his testimony, that contract language is either right or wrong. A collective-bargaining contract is not the repository of ultimate truth but, rather, represents the parties' best efforts to arrive at a workable middle ground. When contract bargaining is conducted in good faith, everything is negotiable.

Good-faith bargaining also requires forthrightness. Prior to the commencement of negotiations the Company had formulated its contract goals and prepared drafts of specific proposals. In view of the extensive and detailed nature of these proposed changes, good-faith bargaining required that the Company inform the Union of these proposals, in as great detail as possible, at the outset of negotiations, or the earliest possible time, in order to enable the Union to intelligently study the proposals and enable the parties to work their way toward an acceptable compromise. Instead, the Company disclosed its proposals, bit by bit, over the course of negotiations, saving some of the most difficult or controversial items to the last possible minute. The

Company contemplated a major revision of job classifications, assertedly in order to achieve greater flexibility in work assignments. However, the Company did not submit its proposal in this regard until February 18, 10 days before the existing contract expired. Considering the many other issues between the parties, including the matter of wages and fringe benefits, which had not even been reached for discussion at that point, it was not reasonably possible for the Union to intelligently study these proposals and for the parties to make an in-depth effort at compromise on this matter before March 1. As the contractual job classification structure was tied to the wage schedule, the Company could not in good faith proceed on the basis that language could not be traded for money and that issues of language and money should be considered separately. In these circumstances the Union had little alternative but to do as it did, and reject the Company's proposal *in toto*.

Company Chief Negotiator Becker testified that in November, when he and President Pease formulated the Company's proposal for plant seniority, they wished to protect the senior employees, and therefore included a cutoff date which ultimately became April 1, 1969. In other words, employees who had a seniority date prior to April 1, 1969, would retain unitwide seniority. At another point in his testimony, Becker asserted that although the Company submitted the plant-seniority proposal on January 6, it did not include a cutoff date until January 19, when it did so ostensibly to meet the Union's demand for protection of senior employees. This alleged concession was in any event more cosmetic than real, because employees with a seniority date prior to April 1, 1969, had such great seniority that they were virtually immune from economic layoff. Similarly, the Company made no real movement toward compromise on its proposal to reduce layoff status without loss

of seniority from 18 months to 6 months. On March 14, 2 weeks after the strike began, the Company proposed a cutoff date of April 1, 1969, which would accord the senior employees layoff status for 1 year. In view of the Company's ostensible concern for senior employees and their virtual immunity from layoff, it is difficult to see why, if the Company were acting in good faith, it did not submit this cutoff date in its initial proposal, or soon thereafter. The Company made no movement in the direction of compromise on the real issue, i.e., layoff status of employees who faced a real possibility of layoff, until well after the strike began, when it verbally suggested the possibility of 9 months' layoff status for the junior employees with more than 18 months' seniority.

I am not persuaded that prior to April 13, in the words of the complaint, the Company "reneg[ed] on and alter[ed] portions which it had previously agreed to." The question of whether the Company reneged on a compromise providing for 30 minutes call-in time for Saturday overtime relates to a misunderstanding rather than an actual agreement. However, the Company misled the Union as to the issues which separated them and thereby acted in bad faith as much as if it had actually reneged on an agreement. In February, when the parties were discussing vacations, Becker impliedly assured the Union that wages would not be a serious problem, saying "we are not going to give you guys 3 cents and don't come in for a dollar." After prodding from the Federal Mediator, who entered the negotiations on February 25, at the Union's request, the parties submitted their monetary proposals. The Company's wage proposal, submitted on March 8, provided for no increase in the wage rates. As to the matter of Company rules, these were set forth at length in the current contract. Early in the negotiations, the Union proposed a change

in one of the rules. The Company disagreed, saying that the rule was satisfactory as it was, and the Union dropped the matter because there were more important matters to discuss. Not until February 24, did the Company disclose its real position, namely, that the rules should be deleted entirely from the contract. The reasons advanced by the Company for this proposal were in themselves evidentiary of bad-faith bargaining. The Company's position was that if the rules were retained in the contract, that would require negotiations to change the rules, and would infer a mutual obligation to enforce the rules. However, an employer has a legal obligation to bargain with the representative of its employees about changes in work rules, whether or not those rules are contained in a collective-bargaining contract. *Miller Brewing Company*, 166 NLRB 831, fn. 1 (1967), enf'd 408 F.2d 12, 16 (C.A. 9, 1969). And if implied mutual responsibility were a problem (the Company did not contend that it was a real as distinguished from a theoretical problem), that problem could have easily been resolved by appropriate prefatory language. Collective bargaining is not a game. There may be situations where a party, by reserving a prospective concession, might facilitate ultimate compromise. Here however, there were so many issues to discuss that prolongation of creation of unnecessary, unreal, or unimportant differences could not be excused within the framework of good-faith bargaining

The Company virtually inundated the Union with a shower of papers. Usually toward the close of a session, the Company would submit typewritten proposals, often lengthy, for disussion at the next session. When the paries failed to agree on the language of a contract clause or proposed clause, the Company would submit at the next meeting a completely retyped proposal, differing in language

from the previous proposal. The Company, and specifically Ever-Strait Industrial Relations Manager Neal Jackman, took upon itself the function of scribe for the negotiations. Had the Company worked from a single triple spaced draft, and submitted alternative proposals at the time the matter in question was discussed, instead of doing so at the next meeting, the negotiations could have been greatly facilitated, particularly as to minor issues. If necessary, Company President Pease, who was nearby, could have been consulted as to such alternative proposals if they were of such great importance and novelty to warrant such consultation. Instead, much time was wasted because the Union was forced to go over each submission in order to determine whether, and if so to what extent, that proposal differed from the existing contract language, the Company's last proposal, the Union's last proposal, and the language if any, previously agreed upon by the parties. In these circumstances, and in light of the ground rules laid down by negotiator Becker, it is understandable that the Union felt it necessary to keep going back to Article I and through the contract in order to determine, or to confirm, what had been agreed upon.

One may well argue, as to this and other matters, that what is sauce for the goose is sauce for the gander, and that the Union should have acted more vigorously in pursuing its right to expeditious and meaningful negotiations. However, under the Act both parties are obligated to bargain in good faith, and the failures of one party cannot excuse conduct amounting to bad faith on the part of the other party. *Yellow Cab Company,* 229 NLRB 1329, 1336 (1977).

Although there were genuine issues of substance between the parties, some of the Company's proposals were patently frivolous. The Company proposed changes in

language were obstensibly designed to remedy certain problems, but in fact the ostensible problems were hypothetical rather than real or even probable. The proposal to delete Company rules from the contract has been discussed *supra*. The Company proposed to increase the probationary period for new employees from 30 to 90 days. (After the strike began, the Union proposed 45 days and the Company came down to 60 days.) The ostensible reason for the proposal was to enable the supervisors to take a longer look at new employees. In fact, the Company had not hired new employees in the unit for some time, and had no plans to do so in the immediate future, except possibly as strike replacements. Many employees were still on layoff. Under normal, i.e., nonstrike, conditions, the only practical effect of the proposal would be to exclude temporary summer help from the Union security clause, which became operative upon completion of the probationary period. On April 13, after the Company had hired many strike replacements, the Company proposed that employees hired after March 1 should not be required to join the Union. The inference is warranted, and I find, that the Company submitted its 90-day proposal solely for the purpose of undermining the Union's strength in the bargaining unit. The Company took other positions ostensibly based on considerations which had no basis in reality; e.g., proposing to revise the Union label clause (the Union agreed to this in order to move on to more important matters); proposing a reference to "qualified" employees where qualifications were not a factor, i.e., in taking inventory; and refusing to agree to an innocuous union proposal regarding reimbursement for safety glasses.

From the outset of negotiations, the Union's concern with subcontracting was a major topic of discussion. After the Company rejected language to restrict subcontracting

which would cause loss of jobs, the Union proposed, in the alternative, severance pay for the laid-off employee or the right to transfer to another company plant without loss of seniority or other contractual rights. All of the proposals were totally rejected by the Company. It is true that the Company advanced reasons for its position. However, the Company offered no concessions in this area, even as to the amount of severance pay. Standing alone, the Company's position on this issue would not constitute bad-faith bargaining. However, when coupled with the Company's refusal to make meaningful concessions on its own proposals for plantwide seniority, reduction of layoff status, and substantial elimination of job seniority as the controlling factor in work assignments, the net effect was to deprive all but the most senior employees of job security based on seniority, which the Union considered to be the lifeblood of the contract. Again, the Company's positions on these issues do not *per se* constitute bad-faith bargaining. However, when considered in light of other facts discussed herein, they evidence that the Company was determined from the outset that it would not negotiaite a contract except on its own terms, which terms the Company knew were not acceptable to the Union.

The Complaint does not allege, nor does the evidence indicate, that the Company ever refused to furnish requested information relevant to the negotiations. However, the Company manifested bad faith by the inconsistent and evasive positions which it took in order to avoid giving the Union a basis for requesting certain data. During the negotiations the Union requested to see the Company's profit-and-loss statement. The Company refused, stating that it was not pleading poverty but wanted to maintain its ability to compete in the market. However, the Union requested, and the Company furnished, a breakdown of

the Company's cost per employee, As indicated, the Company proposed no increase in the contractual wage scale. However, on March 1, the Company submitted a proposal which would continue the contractual cost-of-living adjustments, but with caps on any increases, which would substantially reduce the rate of increase. On April 13, the Company withdrew its cost-of-living proposal and also proposed that supervisors be permitted to do unit work without limitation and that employees hired after March 1, not be required to join the Union. The Company submits that these changes from its prior positions were made in good faith because they were warranted by changed conditions resulting from the strike. Putting aside the second and third proposals, the Company's explanation of (or failure to explain) its position on cost of living was inconsistent and evasive. The Company offered to prove that the strike was costly. However, the Company never took the position at the bargaining table that its ability to pay cost-of-living increases was impaired by the strike, and it carefully avoided taking such a position at the hearing. In fact, as heretofore indicated, the Company was in the process of expanding its operations, which fact indicates that the Company was doing quite well. The inference is warranted, and I find, that the Company deliberately took an evasive position on the reasons for its monetary proposals in order to avoid giving the Union a basis for obtaining profit-and-loss information and that the Company withdraw its prior cost-of-living proposal in reprisal for the strike, to take advantage of the Union's apparent weakness in the strike, and to insure that its proposals would remain unacceptable to the Union. Therefore, its change in position is evidentiary of bad-faith bargaining.

D. *Concluding Findings and the Strike*

Upon consideration of the evidence, including the Company's conduct both at and away from the bargaining table, I find that the Company entered and continued through negotiations with a closed mind. Specifically the Company determined that it would not negotiate a contract except on its own terms, which it knew would be unacceptable to the Union, and therefore determined to force the Union into a strike, secure in the belief that it could successfully win such a strike and thereby rid itself of the Union. To that end, the Company intentionally dragged out the negotiations, misled the Union as to its positions, raised spurious issues, created obstacles to agreement and utilized procedures designed to protract bargaining and obfuscate the issues, and adamantly refused to make any meaningful concessions on any substantial issue between the parties, all in order to insure that no agreement would be reached before a strike. After ascertaining that the strike would be unsuccessful, the Company also withdrew at least on prior proposal in order to insure that no agreement would be reached. In sum, the Company has failed and refused to bargain in good faith with the Union, and therefore has violated and continues to violate Section 8 (a) (5) and (1) of the Act. *Stuart Radiator Core Manufacturing Co., Inc.,* 173 NLRB 125 (1968); *Neon Sign Corporation,* 229 NLRB No. 125 (1977).

At union meetings of February 4, 18 and 25, the Union's negotiators kept the membership informed on the progress of negotiations. On February 25, chief negotiator Swope told the members that the Company was standing fast on plant-wide seniority and 6-month layoff, and that the Union had nothing on subcontracting. At the February 25 meeting, a vote was taken on whether to accept or reject the company's latest proposal. In fact, the Company had not

even submitted any proposals on monetary matters, and did not do so until after the strike began. Indeed, in view of the Company's ground rules the employees had no way of knowing whether they had received any firm proposals from the Company. This situation was caused at least in part by the Company's refusal to bargain in good faith. A vote to reject the Company's proposal was a vote to strike. The employees voted nearly unanimously to strike. However, Swope testified that the Union would have held off on a strike if there had been progress in the negotiations. The next negotiation session, on February 28, produced no progress, and the employees struck the next day, upon expiration of the 1974-77 contract. I find that the strike was caused and prolonged at least in part by the Company's failure and refusal to bargain in good faith, and therefore was from its inception an unfair labor practice strike. *Stuart Radiator Core Mfg. Co., supra,* at 126.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. All factory production and maintenance employees employed by the Company at its 900 Forrest Avenue, Hamilton, Ohio, 2580 Bobmeyer Road, Hamilton, Ohio, and 7100 Dixie Highway, Fairfield, Ohio, locations, but excluding all office clerical employees, professional employees, guards, supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. At all time material, the Union has been, and is, the

exclusive collective-bargaining representative of the Company's employees in the unit described above.

5. The Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) and (5) of the Act, by failing and refusing to bargain in good faith with the Union as the exclusive representative of the employees in the appropriate unit.

6. The strike which began on March 1, 1977, was from its inception an unfair labor practice strike.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy

Having found that the Company has been and is violating Section 8 (a) (5) and (1) of the Act, I shall recommend that it be required to cease and desist from such violations, upon request to bargain in good faith with the Union, and to post appropriate notices. As the Company's unlawful conduct demonstrates an intent to rid itself of the Union as bargaining representative of the unit employees, I shall recommend that the Company be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act. *Westinghouse Electric Supply Company (WESCO), a division of Westinghouse Electric Corporation,* 232 NLRB 392, fn. 3 (1977).

General Counsel and the Union have requested remedies which deviate from the Board's usual remedy in these cases. General Counsel submits that the unfair labor practice strikers should be treated as discriminates (i.e., entitled to reinstatement and backpay) from the date of their replacement. The Union submits that they should be treated as discriminatees from the time they went on strike. How-

ever, it is settled Board policy not to award backpay to striking employees until they make an unconditional offer to return to work. *Grunau Company, Inc., a/k/a Grunau Sprinkler Corporation,* 207 NLRB 732, 734 (1973). There are no facts presented in this case which would warrant deviation from that policy. Instead, in accordance with the Board's usual policy, I shall recommend that the Company be ordered to reinstate the striking employees upon their unconditional application for reinstatement and to make them whole for any loss of pay they may suffer by reason of refusal of such reinstatement. *Ploof Transfer Company, Inc.* 201 NLRB 828 (1973). The backpay for said employees shall be computed in accordance with the formula approved in *F. W. Woolworth Company,* 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977).[4] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[5]

The Respondent, Pease Company, Hamilton and Fairfield, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the Union as the exclusive representative of all its employees in the above-described appropriate unit.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above with regard to rates of pay, hours of employment, and other terms and conditions of employment and if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon their unconditional application, offer strikers not heretofore reinstated immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make whole for any loss of earnings strikers who have made themselves available for employment on an unconditional basis but who were refused reinstatement, as set forth in the Section herein entitled "The Remedy."

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, ssocial security payment records, timecards, personnel records and reports, and all other records, necessary in determining the amount due as backpay.

(d) Post at its Hamilton and Fairfield, Ohio, plants copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[6] In the event that this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX C

No. 78-1395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PEASE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

OHIO VALLEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, LOCAL No. 1787, AFL-CIO,

Intervenor.

JUDGMENT ENTRY

(Filed December 16, 1981)

Before: KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

On petition to review and cross-application for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the record of proceedings before the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the Company's petition to review the Board's order is granted, and the Board's cross-petition for enforcement is denied.

It is further ordered that Petitioner recover from Respondent the costs on appeal as itemized below.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

EXCERPTS FROM TRANSCRIPT – TESTIMONY BEFORE NLRB

Testimony of Carl A. Becker

Page 1015

Q. What is your occupation?

A. I am an attorney.

Page 1017-1018

Q. Now, it's been testified that you were the chief negotiator for the Company. What were your responsibilities in negotiations?

A. Well, as chief negotiator, I guess I had a multiplicity of responsibilities. It was my duty at the table to

speak for the Company. I had a responsibility to report back to the Company as to the results of each of the negotiations sessions. I had a responsibility then to work with the Management Committee and Neal to devise changes in the language to try to meet the requests of the Union, based upon — based upon what happened at each of the negotiations. I had a responsibility to make recommendations as the Company asked about good industrial practices based upon my history and experience of dealing with a variety of industrial companies around the country and to make recommendations in terms of current practices in regards to most all the items that normally are found in a contract.

Page 1042-1043

Q. Did you have any other discussions with regard to financial information?

A. Well, you mean Union's request for financial information?

Q. Yeah.

A. No, we did not. They did not, as I really recall, did not — wait a minute. I take that back. Yes, at a point in time, toward the latter part of negotiations, and this was after the subject had come up once before, in briefer form, the Union said we understand that you have said that the Company is pleading an inability to pay referenced wage increase. I said that that is absolutely untrue. At no time, has the Company pleaded an inability to pay. As a matter of fact, I think it's probably common knowledge, but if it isn't, the Company is currently making money. I said, what I had

been talking to you about, is maintaining our competitive position in the future.

Testimony of Neal Jackman

Page 574

Q. What is your position with the Pease Company?

A. Industrial relations manager of the Ever-Strait Division of Pease Company.

Page 643-644

Q. Directing your attention to Section IV, 6-I, did the Company submit a proposal?

A. This was in relation to the clause which stated the existing language that employees on second shift would be excused to be given time off without pay for the attending of any union meeting.

This proposal came about again at the suggestion of the supervisors, those who supervise the second shift.

Our problem, that the company found that one night a month when the union meeting would be held that it meant that for all practical purposes we had to shut down the second shift, at least the manufacturing line, the door line, at the Ever-Strait facility.

Most of the employees would attend the union meeting, some who would stay you utilized the best you could. It was very counterproductive.

So the company proposed to delete this section, and the proposal of R-14-RR was submitted on the 8th of February.

Page 961

Q. I believe the Company's proposal, the last sentence, the employee will receive no compensation et cetera? Is that correct?

A. Yes, that's correct.

Q. Did the Company explain to the Union, why they wanted that particular sentence included in that proposal?

A. Yes, In a general tightening up of economic provisions, this proposal was made . . .

Testimony of Edwin Swope

Page 25

Q. What office have you held in the union?

A. I have . . . held the position of chairman of the negotiations.

Page 208

The company said there will not be a union office.

Q. Did they give you any reason why there wouldn't be a union office?

A. The reason was cited like it was going to become a lounge or, you know, a play area.

Q. How long had there been a union office in the plant? Let's say at the Ever-Strait plant where you worked?

A. Where I worked there had been a union office there since the day it opened, February 18 — well I came March 17, 1969.

Page 146-147

Q. Paragraph G, did the union make any proposal in regard to Paragraph G in Section 6, Layoffs?

A. Yes. The union felt that Section G was too broad. It says the president, officers, committeemen and stewards of the union shall be retained at work in the plant regardless of their seniority, provided there is work avaiable.

We had somewhat of a problem with this and the negotiating committee and the president of the union felt that the way this was written wasn't fair. It says officers, what is an officer? You could have a delegate to district council, he is an officer of the union but he is not vital to the union's existence in the everyday work with management. Okay. We could have a picnic committee and he is an officer. But the way it was written it didn't say. It said officers and it said committeemen. We felt it should be shop committeemen, not picnic committeemen or Christmas Club committeemen.

So we proposed a change in writing to the company of who should be exempt. We wrote down in the category of what we needed to operate the union, and, also, work with the company. Now some of the jobs could be looked at by management that weren't maybe like the financial secretary. Maybe it does not mean that much to the company but he is vitally important to the administration and to the president of the union to take of the financial situation, the dues, working with company representatives, the people in payroll at times, you know, getting everything straight. It is important he be retained.

Like I said delegate, no, and the other committeemen as I stated to you. We needed some type of guidelines on it.

The company gave a proposal to us that exempted the president and the union stewards only. It didn't cover the chief steward, it didn't cover the financial secretary, it didn't cover recording secretary which we felt was vital.

What I am saying is the way the contract had been lived under it was broad. We recognized it and took the initiative to pull it down a little bit and take some of that fat off that we felt shouldn't be exempt. We did not reach an agreement on it.

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He said "as you are well aware we have hired people and that are permanent replacements, and one of their conditions will be they do not have to join the union as a condition of employment".

At that meeting I remember clearly that Mr. McVey the president of the union said "In other words we are going to have half union and half non-union". As best I can recall Mr. Becker stated that "well we have got a problem and it looks that way".

APPENDIX E

STATUTES

THE FOLLOWING ARE THE RELEVANT PORTIONS OF THE LABOR MANAGEMENT LABOR RELATIONS ACT, AS AMENDED, 29 U.S.C. 151 ET. SEQ.

§ 8(a)(5), 29 U.S.C. 158(a)(5)

It shall be an unafir labor practice for an employer — to refuse to bargain collectively with the representatives of his employees. . .

§ 8(d), 29 U.S.C. § 158(d)

. . . to bargain collectively is the performance of the mutual obligation of the employer the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . .

§ 10(c), 29 U.S.C. § 160(c)

. . . If upon the proponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person

an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and order dismissing the said complaint. . .

§ 10(e), 29 U.S.C. § 160(e)

. . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . .

Opposition

1

Supreme Court, U.S.
FILED
APR 19 1982
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1710

OHIO VALLEY CARPENTERS DISTRICT COUNSEL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AFL-CIO, LOCAL NO. 1787,

Petitioner

v.

PEASE COMPANY,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that the National Labor Relations Board's conclusion that Respondent had failed to bargain in good faith was not supported by substantial evidence on the record as a whole.

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OPINIONS BELOW

The December 16, 1981, opinion of the Court of Appeals for the Sixth Circuit is reported at 666 F.2d 1044 (6th Cir. 1981) and is set forth in Petitioner's Appendix 1a-16a. (Hereinafter cited as Pet. App.) The decision of the National Labor Relations Board is reported at 237 NLRB 1069 and 99 LRRM 1166 and is set forth in Pet. App. 16a-47a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondent, Pease Company (hereinafter "Pease" or the "Company") is an Ohio corporation engaged in the manufacture and sale of prefabricated houses, doors and related building products at its Hamilton and Fairfield, Ohio, plants. Petitioner, Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, Local 1787, AFL-CIO (hereinafter "Petitioner" or "Union") has represented Pease's production and maintenance employees since 1945. Pease has generally enjoyed amicable relations with Petitioner for over three decades, and has negotiated nineteen successive collective bargaining agreements with the Union within that period. Pet. App. 2a.

Until 1969, Pease operated but one plant in Hamilton, Ohio. In that year a second plant was added in nearby Fairfield, Ohio, and in 1974 a third plant was established in Hamilton, Ohio. As each of these plants commenced production, Pease voluntarily extended recognition to the Petitioner, and the production and maintenance employees at all three plants constitute a single bargaining unit. *Id.*

Pease and Petitioner commenced negotiations for a new collective bargaining agreement on December 15, 1976 — two and one-half months before the expiration of the

contract in effect at that time. Both sides submitted substantial proposals and the Petitioner conceded that Pease gave advance notice of its desire to make "some changes" in the contract. The negotiations relevant in this case continued for a total of eighteen sessions. In February, 1977, a federal mediator entered the negotiations and attended all but one of the subsequent sessions. A strike was undertaken by the Petitioner on February 28, 1977, immediately upon the expiration date of the contract, and negotiations continued thereafter. Pet. App. 3a-5a.

On February 24, 1977, Petitioner filed an unfair labor practice charge alleging that Pease had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1) and (5) (hereinafter the "Act"). The National Labor Relations Board (hereinafter the "Board") reversing its Administrative Law Judge in part, held that Pease had failed to bargain in good faith in violation of § 8(a)(5) of the Act. Pease thereafter petitioned the Sixth Circuit Court of Appeals to review and set aside the Board's order. The Board cross-petitioned for enforcement. The Petitioner intervened, seeking enforcement. Pet. App. 1a-16a. The court of appeals granted Pease's petition and denied enforcement of the Board's order. The court of appeals found that the Board's order was not supported by substantial evidence on the record as a whole; and that Pease had not violated §§ 8(a)(5) and 8(a)(1) of the Act. Pet. App. 1a-16a.

ARGUMENT

Petitioner contends that the Court should grant a writ of certiorari because "the decision of the Court of Appeals for the Sixth Circuit is in conflict with the decisions of other courts of appeal." Petitioner's Petition at 6. The basis of this supposed conflict is the Petitioner's contention that the legal standard utilized by the court of appeals to review the Board's decision, is in conflict with the standards set by this Court and other courts of appeal. That

contention is without merit. The court of appeals correctly declined to enforce the Board's order because, based upon the totality of the circumstances, there is not substantial evidence on the record as a whole to support the Board's finding that the Company failed to bargain in good faith in violation of § 8(a)(5). Pet. App. 15a. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

In reviewing the Board's decision, the court of appeals began its analysis by quoting the following findings of the Administrative Law Judge:

> General Counsel does not contend, nor does the evidence show, that the company ever refused to meet at reasonable times or with reasonable frequency, or that the company ever failed or refused to discuss a proposal. During the first five or six sessions, which extended into February, the parties met from 1:00 p.m. to 3:30 p.m., when the first shift ended, at which time the union representatives indicated that they wished to leave. As the contract expiration date approached, the parties met with increased frequency. All issues eventually were discussed between the parties, and the principal issues were discussed at length.

Pet. App. 9a. Despite these findings, the court noted that the Board nonetheless concluded that the alleged "unacceptability" to the Union of Pease's contract proposals established its lack of good faith bargaining. Indeed, the court properly recognized that the Board's conclusion with respect to the unacceptability of the Pease proposals to the Union was the "touchstone" from which all of the Board's findings of bad faith emanated. Pet. App. 92.

The court rejected that as a proper standard upon which to test good faith and held:

> The proper standard, then, is not whether the Company made proposals which were acceptable to the Union, but rather, whether the Company desired 'to reach ultimate agreement, to enter into a collective bargaining contract.' *N.L.R.B. v. Insurance Agents*, 361 U.S. 477, 485

> (1960). Our examination of the specific indicia relied on by the ALJ and the Board leads us to conclude that neither the proposals nor the tactics of the Company, nor the sum of its conduct, amounts to substantial evidence of bad faith.

Pet. App. 11a. In rejecting the "acceptability" of Pease's proposals to the Union as the proper standard upon which to measure Pease's good faith, the court of appeals acted in accordance with expressed Congressional intent and the holdings of this Court.

In *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395 (1952), this Court reviewed the history of enforcement of the obligation to bargain collectively, recognizing that prior to the 1947 amendments to the Act, the Board had held that "the duty of an employer to bargain collectively required the employer 'to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals and to make every reasonable effort to reach an agreement.'" *Id.* at 402. The Court went on, however, to emphasize that in 1947 Congress expressed the fear that the Board:

> [h]as gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make.

Id. at 404.

Accordingly, although the Board's requirement of "good faith" was incorporated into the Taft-Hartley Act amendments, it was expressly limited by the provision that such an obligation does not compel either party to agree to a proposal or require the making of a concession. Act § 8(d). The test imposed by the Board in this case — its evaluation of proposals in terms of their acceptability to the other side — was expressly rejected by Congress in the Taft-Hartley amendments. As stated by the Supreme Court, "Congress provided expressly that the Board should not pass upon the

desirability of the substantive terms of labor agreements." 343 U.S. at 409.

It is noteworthy that in its attempt to establish that the decision of the court of appeals is in conflict with the decision of other courts of appeal, nowhere in its petition has the Petitioner even quoted the standard applied by the court of appeals. That is, the Petitioner has simply chosen to ignore the standard applied by the court, that the proper legal test upon which to measure a company's good faith is whether the company desired to reach ultimate agreement, to enter into a collective bargaining contract, the standard established by this Court in *N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

Recognizing that the issue of whether Pease desired to reach ultimate agreement can only be resolved by viewing the totality of the employer's conduct, the court carefully examined the totality of conduct of Pease. This is the standard of review applied by every court which has been faced with the issue of alleged surface bargaining, including the courts whose decisions were cited by Petitioner as being allegedly in conflict with the case at bar.

For example, Petitioner contends that the First Circuit in *N.L.R.B. v. CableVision, Inc.*, 660 F.2d 1 (1st Cir. 1981), has split with the Sixth Circuit both on the weight to be given proposals and concessions and the deference to be given the Board's inferences about an employer's state of mind. In fact, the First Circuit's decision in *CableVision* is entirely consistent with the holdings in the present case. In both cases the respective courts applied the same standard and looked to the totality of the employer's conduct to determine whether the employer went through the motions of negotiations or whether it had a sincere desire to reach an agreement. In *CableVision*, the court found that the bargaining between the parties was marked by a series of delays caused primarily by the employer. The employer avoided meetings with the union and refused to agree to proposals by the union as to the frequency and length of bargaining sessions. Moreover, the employer failed to

provide any written proposals of its own until the fifth bargaining session, three and one-half months after receiving the union's proposals. The combination of these delays, which the court said would alone support a finding of an unfair labor practice, with the employer's insistence on a contract which was worse than that existing prior to unionization, persuaded the court that the company was engaged in surface bargaining as a means of ridding itself of the union.

The present case involves no such delays by Pease. On the contrary, according to the Administrative Law Judge, Pease met at reasonable times and with reasonable frequency, never failed or refused to discuss proposals, discussed all issues, and discussed the principal issues at length. Pet. App. 92. In fact, the Board found that not one per se violation of the Act had been committed by Pease. Moreover, the history of negotiations as outlined by the First Circuit in *CableVision* was considerably less in depth than those in the present case. Most importantly, however, the factor of delay, which is not present in the case at bar, was very persuasive to the court in *CableVision*. Citing *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953), the court in *CableVision* stated that:

> The circumstances present here are sufficiently close to those at issue in *Reed & Prince*, 205 F.2d at 131 (employer's delay of initial bargaining session, refusal to allow union to post routine notices to members, unjustified delay in providing requested information, adamant refusal to consider key terms without a principled reason, and presenting a seriously deficient and one-sided "proposed contract") as to warrant a similar result. See *K-Mart Corp. v. N.L.R.B.*, 626 F.2d 704, 706-07 (9th Cir. 1980). *N.L.R.B. v. Wright Motors, Inc.*, 603 F.2d 604, 608-10 (7th Cir. 1979). See also *Alba-Waldensian, Inc.*, 167 N.L.R.B. 695 (1967). 660 F.2d at 5.

The Petitioner further contends that the present case is in conflict with the Ninth Circuit's decision in *N.L.R.B. v. Mar-Len Cabinets, Inc.*, 659 F.2d 995 (9th Cir. 1981). In that

case, there were several factors which led the court to agree with the Board's holding that the employer had not bargained in good faith. First, the employer in *Mar-Len Cabinets* cancelled all bargaining sessions after a strike was called claiming that the union had lost majority support; withdrew recognition of the union as the collective bargaining representative for the unit of employees involved, and also encouraged several employees to resign from the union and return to work prior to the employer's withdrawal of recognition. Finally, the employer declared its objective of going non-union prior to beginning collective bargaining negotiations. In a letter to the union, the employer stated that "we do not wish to continue in the union, however, we are willing to sit at the bargaining table and bargain with you if you wish." These factors, coupled with certain company proposals persuaded the court that the Board's conclusion with respect to bad faith bargaining was supported by substantial evidence. *Id.* at 999.

Again, the present case involves none of the factors referred to above. Pease did not engage in any of the conduct which was involved in *Mar-Len Cabinets*. Pease expressed no intention of going non-union nor did it withdraw recognition of the union after the strike had begun. Indeed, Pease's proposals were designed to effectuate needed operational reforms and the alleviation of burdensome and costly contractual provisions. In contrast, the proposals offered by the employer in *Mar-Len Cabinets* were exactly the kind of "unusually harsh and unreasonable proposals" which the court of appeals expressly found were not present in the case at bar. Pet. App. 13a.

Finally, the Petitioner contends that the present case is in conflict with the Seventh Circuit's holding in *N.L.R.B. v. Wright Motors, Inc.*, 603 F.2d 604 (7th Cir. 1979). This is one of the cases specifically distinguished by the court of appeals in its opinion. Pet. App. 13a. In *Wright Motors*, the court concluded that there was substantial evidence to support the Board's conclusion that the employer had engaged in surface bargaining. The evidence upon which the court based its

decision included the fact that the employer had proposed "unrealistically harsh positions to which it adhered for six months coupled with the employer's avoidance of bargaining on economic issues." The company's proposals included,

> . . . (1) a guarantee of an 'open shop,' limiting the union's right to secure members and check off authorizations, (2) a management rights clause, not subject to the grievance procedure, which gave the company exclusive control over hours, work rules and production and allowed the company to shut down its business without regard to the effect on employees, (3) a no-strike, no-lockout clause which required the union to fine any employee who engaged in a prohibited work interruption, granted the company the right to seek an injunction and damages against the union without arbitrating the claim, made all union members liable individually and collectively for damages, and required the union to waive its legal right to remove a suit from state to federal court, (4) an article on arbitration, providing only limited and permissive arbitration, and (5) a provision allowing the company to set hourly wage rates and to grant promotions at its sole discretion.

Pet. App. 13a-14a. In distinguishing the decision in *Wright Motors*, the court of appeals recognized that "unusually harsh and unreasonable proposals may support a finding of bad faith bargaining," but concluded that no such proposals were present in the case at bar. Pet. App. 13a. Moreover, there is no hint in the present case that Pease was attempting to avoid bargaining on economic issues by insisting on unreasonable positions. Accordingly, there is nothing in the court of appeals holding in the present case which is inconsistent with the Seventh's Circuit's holding in *Wright Motors*.

The Petitioner's final argument proposes that the court of appeals improperly failed to give proper weight to the inferences drawn by the Board from the record before it; and that the reviewing court may not substitute its judgment for that of the Board. The Petitioner has failed to specify

however what inferences the court of appeals found contrary to the Board. In any event, Petitioner's contention is erroneous. There is nothing in the decision of the court of appeals which suggests that the court based its decision on inferences of fact contrary to those drawn by the Board. What the court of appeals did hold in conformity to long standing standards of review was that there was not substantial evidence on the record as a whole to support the Board's findings. Pet. App. 15a. Stated differently, the court of appeals held that the evidence before the Board was an insufficient basis upon which to hold that Pease had bargained in bad faith.

Moreover, the Petitioner has completely overlooked the key phrase in its stated position. That is, the reviewing court is not to substitute its judgment for the Board, where different inferences may be "reasonably drawn." If the Board's inferences are not reasonably drawn from the evidence, or are based upon legally incorrect standards, the reviewing court has no obligation to defer to the Board. Where the erroneous legal standard of "acceptability" of proposals has been applied by the Board, in refusal to bargain cases, the various courts of appeal have considered inferences drawn under this test as unreasonable and have refused to enforce Board orders predicated upon it. *N.L.R.B. v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978); *Gulf States Mfrs. Inc. v. N.L.R.B.*, 579 F.2d 1298 (5th Cir. 1978).

Therefore, the court of appeals was entirely within its reviewing authority in this case to draw a conclusion of hard bargaining, as opposed to surface bargaining. To hold otherwise would render the courts of appeal powerless to review refusal-to-bargain charges based upon the parties' conduct at the bargaining table.

CONCLUSION

The Sixth Circuit Court of Appeals applied the correct legal standards in reviewing the Board's decision, and properly concluded that there is not substantial evidence on the record as a whole to support the Board's finding that the Company failed to bargain in good faith in violation of § 8(a)(1) and (5) of the Act. Therefore, the petition for a writ of certiorari should be denied.

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PROOF OF SERVICE

CERTIFICATE BY A BAR MEMBER

I, STEPHEN L. BLACK, hereby certify:

1. That I am a member of the Bar of the United States Supreme Court; and

2. That three copies of Respondent's Brief in Opposition to the Petition for Writ of Certiorari were served on all parties required to be served, including the individuals listed below at the addresses listed for each individual, by depositing such copies in the United States post office, with first-class postage prepaid, on April 15, 1982:

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Opposition

2

Supreme Court, U.S.
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No. 81-1710

In the Supreme Court of the United States

OCTOBER TERM, 1981

OHIO VALLEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL NO. 1787, PETITIONER

v.

PEASE COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

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OHIO VALLEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL NO. 1787, PETITIONER

v.

PEASE COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board held that respondent Pease Company ("the Company") failed to bargain in good faith with petitioner ("the Union"), in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 16a-47a). The Board accepted the findings of the administrative law judge that (*id.* at 42a):

> [T]he Company intentionally dragged out the negotiations, misled the Union as to its positions, raised spurious issues, created obstacles to agreement and utilized procedures designed to protract bargaining and obfuscate the issues, and adamantly refused to make any meaningful concessions on any substantial issue between the parties, all in order to insure that no agreement would be reached before a strike. After ascertaining that the strike would be unsuccessful, the Company

also withdrew at least one prior proposal to insure that no agreement would be reached.

Accordingly, the Board concluded that the Company "entered into and continued contract negotiations with the Union with a closed mind, having determined that it would not negotiate a contract except on its own terms, which it knew would be unacceptable to the Union and would force the Union to strike" (Pet. App. 17a).[1]

2. The court of appeals denied enforcement of the Board's order, holding that the Board's finding that the Company failed to bargain in good faith was not supported by substantial evidence (Pet. App. 2a). Rather, the court held that "this [was] simply a case of hard bargaining between two parties who used their respective economic power to their best advantage" (*id.* at 15a).

While acknowledging that "unusually harsh and unreasonable proposals may support a finding of bad faith bargaining" (Pet. App. 13a), the court found that the Company's proposals—including reduction of employees' layoff status, the switch from unit to plant seniority, a longer probation for new employees, modification of the method for assigning overtime, and the continuance of the Company's existing right to subcontract production were "not harsh, vindictive or unreasonable" (*id.* at 14a n.4). The court also found that the Company's withdrawal of a cost-of-living proposal six weeks after the strike began did not establish bad faith, declaring that "[a]n employer has a right to withdraw proposals made before a strike to reflect the changed economic background" (*id.* at 15a). The court

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[1]The Board also found that the strike was an unfair labor practice strike (Pet. App. 43a). The Board also found that two statements of the Company's Operations Manager violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1) (Pet. App. 20a-21a). The petition raises no issue concerning the court of appeals' rejection of those findings (Pet. App. 8a).

further noted that, in this case, "[t]he offer was not withdrawn at a time when agreement was imminent" (*ibid.*).

3. The basic question raised by petitioner is whether the court of appeals erred in refusing to uphold the Board's finding that the Company bargained in bad faith. While the Board believes that the court of appeals should have accepted its finding, it did not file its own petition because the question whether there has been good faith bargaining essentially involves an evaluation of the particular facts—an issue that would not ordinarily warrant this Court's attention.[2] See *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952). However, should the Court grant the petition, the Board will defend its decision.

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[2]Petitioner contends that the court of appeals applied the wrong standard in assessing the Company's bargaining conduct. Thus, petitioner asserts that the court of appeals did not give weight to the nature of the Company's proposals (Pet. 10-11), and improperly concluded that the Company was allowed to enter negotiations with a "predetermined resolve not to budge from a predetermined position" (Pet. 6-7). However, the court acknowledged that the proper standard in evaluating bargaining is "whether the [parties] desired 'to reach ultimate agreement, to enter into a collective bargaining contract' " (Pet. App. 11a) and that "the ultimate finding of bad faith is based upon the totality of the circumstances" (*id.* at 15a). The court also acknowledged that "unusually harsh and unreasonable proposals may support a finding of bad faith bargaining," but found that "the Company proposals challenged here do not meet this description." In this connection, the court cited with apparent approval several cases from other circuits upholding Board findings of "surface bargaining" based, in substantial part, on the substance of the employer's proposals (*id.* at 13a-14a n.4). The court, however, distinguished those cases on their facts, stating that here, by contrast, "[t]he Company's proposals * * * [were] not harsh, vindictive or unreasonable" (Pet. App. 14a n.4).

Respectfully submitted.

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Solicitor General

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General Counsel
National Labor Relations Board

APRIL 1982

DOJ-1982-04